Murthe a/l Kaliapan & Anor v Mohd Faizal bin Baba & Anor

HIGH COURT (IPOH) — CIVIL APPEAL NO 12B-115–09 OF 2012
AHMAD NASFY JC
21 AUGUST 2013

Civil Procedure — Appeal — Interference by appellate court — Personal injury cases — Whether findings consistent with evidence — Whether appellate interference warranted

Tort — Negligence — Road accident — Apportionment of liability — Whether trial judge erred in finding appellants 100% liable — Whether finding should be reversed — Quantum — General damages — RM300,000 awarded as general damages for lower limb paraplegia suffered by second respondent — Whether award fair and reasonable — Nursing care, post-trial — Whether amount awarded on high side and should be reduced

The motorcar driven by the first appellant had collided into a motorcycle that the first respondent was riding at the vicinity of Taman Melati, with the second respondent riding pillon. The respondents suffered injuries as a result of the accident. The respondents put the total blame for the cause of the accident on the first appellant, while the first appellant denied liability totally. It was the first appellant's contention that the motorcycle had made a sudden exit from a left junction of the road and caused a collision with the motorcar he was driving. The appellants thus filed a counterclaim against the first respondent seeking an indemnity from him for the damages they would have to bear against the second respondent, if any. The trial judge held that the appellants were 100% liable and hence the present appeal against liability and quantum. The appellants maintained that they were not liable for the accident. The appeal against quantum only centered on two items, namely the RM300,000 awarded as general damages for the lower limb paraplegia suffered by the second respondent and the special damages awarded for pre-trial and post-trial nursing care of RM168,000 and RM334,800 respectively.

Held, allowing the appeal against liability and quantum in part with costs:

(1) Based on the evidence of the investigating officer and sketch plan, the road in which the accident occurred was a straight road with no obstacles to obstruct a driver's front view. That being the case, under normal circumstances and if the first appellant had exercised caution he ought to have noticed the presence of the motorcycle and have avoided the

collision. However, the fact that the accident occurred within seconds of the motorcycle coming out of the left junction of the road showed that the first respondent also contributed to the accident (see para 9).

(2) Although an appellate court would be slow to disturb the findings made by a trial court, in personal injury cases the court sitting in an appellate capacity would not be deprived of any advantages that a trial court would have had. In any case, this was an appropriate case where such interference was necessary, in that the findings of the trial judge were not consistent with the evidence. As such, the decision of the trial judge was reversed and substituted with a finding of liability of 70:30 respectively in favour of the respondents (see paras 10–12).

(3) Based on the evidence of the specialists, the spinal-cord injury, which resulted in the paralysis of both the second respondent's lower limbs, was a permanent injury. Having considered the two specialist reports and decided cases the sum of RM200,000 would be fair and reasonable as a global award for theses injuries (see paras 15–17).

(4) As for special damages, ie for nursing care, the post-trial award in part-two of the claim should be reduced. The nursing care in the present case referred to the salary to be paid to a foreign maid to assist the second respondent to carry out activities of her daily living, which salary would range from RM750 to RM900 per month. In relation to the amount to be paid for such care it was necessary to calculate the average life span of the second respondent. The average life expectancy of females in Malaysia is 76.4 years and after taking into consideration the one-third deduction contingency, the life span of the second respondent would be 612 months. These 612 months were correctly divided by the trial judge into two parts, ie 240 months and 372 months, before considering the amount to be apportioned to each part. Although the amount awarded for the first part was correct the amount awarded for the remaining 372 months was on the high side. Thus, this claim was reduced from RM334,800 to RM279,000 (calculated on the basis of RM750 per month x 372 months) (see paras 18–23).

[Bahasa Malaysia summary

Motokar yang dipandu oleh perayu pertama telah berlanggar dengan motosikal yang ditunggang oleh responden pertama di kawasan Taman Melati, dengan responden kedua sebagai pembonceng. Responden-responden mengalami kecederaan akibat kemalangan tersebut. Responden-responden menyalahkan perayu pertama sepenuhnya bagi kemalangan tersebut, sedangkan perayu pertama menafikan liabiliti sepenuhnya. Adalah menjadi hujahan perayu pertama bahawa motosikal tersebut tiba-tiba keluar dari simpang kiri jalan dan menyebabkan pelanggaran dengan motokar yang dipandunya. Perayu-perayu seterusnya membuat tuntutan balas terhadap

responden pertama dan menuntut indemniti daripadanya bagi kerosakan yang harus mereka tanggung terhadap responden kedua, jika ada. Hakim bicara memutuskan bahawa perayu-perayu bertanggungan sebanyak 100% dan dengan itu, rayuan ini terhadap liabiliti dan kuantum. Perayu-perayu menegaskan bahawa mereka tidak bertanggungan bagi kemalangan tersebut. Rayuan terhadap kuantum hanya berkisar pada dua item, khususnya RM300,000 yang diawardkan sebagai ganti rugi am bagi paraplegia anggota badan bawah yang dialami oleh responden kedua dan ganti rugi khas yang diawardkan bagi penjagaan pra-bicara dan selepas perbicaraan yang masing-masing berjumlah RM168,000 dan RM334,800.

Diputuskan, membenarkan rayuan terhadap sebahagian liabiliti dan kuantum dengan kos:

(1) Berdasarkan keterangan pegawai penyiasat dan pelan lakaran, jalan di mana kemalangan tersebut berlaku adalah satu jalan lurus tanpa halangan yang menghalang pemandangan hadapan seseorang pemandu. Oleh itu, dalam hal keadaan biasa dan jika perayu pertama berhati-hati, dia akan menyedari kehadiran motosikal dan mengelakkan kemalangan. Walau bagaimanapun, fakta bahawa kemalangan tersebut berlaku dalam beberapa saat selepas motosikal keluar dari simpang kiri jalan itu menunjukkan bahawa responden pertama menyumbang kepada kemalangan tersebut (lihat perenggan 9).

(2) Walaupun mahkamah rayuan adalah perlahan dalam campur tangan dapatan yang dibuat oleh mahkamah bicara, dalam kes-kes kecederaan diri, mahkamah yang berada dalam kapasiti rayuan tidak terhalang daripada kelebihan yang ada pada mahkamah bicara. Dalam apa jua keadaan, ini adalah kes sesuai yang mana campur tangan adalah perlu, iaitu dapatan hakim bicara tidak selaras dengan keterangan. Oleh itu, keputusan hakim bicara diakas dan digantikan dengan dapatan liabiliti masing-masing 70:30, berpihak kepada responden-responden (lihat perenggan 10–12).

(3) Berdasarkan keterangan pakar, kecederaan tulang belakang, yang menyebabkan kelumpuhan pada kedua-dua anggota badan bawah responden kedua, adalah kecederaan kekal. Selepas mempertimbangkan kedua-dua laporan pakar dan kes-kes yang telah diputuskan, jumlah RM200,000 adalah jumlah yang adil dan munasabah sebagai award global bagi kecederaan-kecederaan ini (lihat perenggan 15–17).

(4) Bagi ganti rugi khas, iaitu penjagaan, award selepas perbicaraan dalam bahagian kedua tuntutan harus dikurangkan. Penjagaan dalam kes ini merujuk kepada gaji yang dibayar kepada pembantu rumah warga asing untuk membantu responden kedua menjalankan aktiviti-aktiviti hariannya, yang mana gajinya antara RM750 hingga RM900 sebulan. Berhubung jumlah yang perlu dibayar bagi penjagaan tersebut, adalah

perlu untuk mengira purata jangka hayat responden kedua. Purata jangka hayat wanita-wanita di Malaysia ialah 76.4 tahun dan selepas mengambil kira pengurangan kontijen sebanyak satu pertiga, jangka hayat responden adalah 612 bulan. 612 bulan ini telah dibahagikan dengan betul oleh hakim bicara kepada dua bahagian, iaitu 240 bulan dan 372 bulan, sebelum mempertimbangkan jumlah yang perlu dibahagikan bagi setiap bahagian. Walaupun jumlah yang diawardkan bagi bahagian pertama adalah betul, jumlah yang diawardkan bagi baki 372 bulan adalah sedikit tinggi. Oleh itu, tuntutan ini dikurangkan daripada RM334,800 kepada RM279,000 (dikira berdasarkan RM750 sebulan x 372 bulan) (lihat perenggan 18–23).]

Notes

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1217–1245.

For cases on road accident, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1601–1900.

Cases referred to

Chai Phin Chong & Anor v Zainal Abidin Mohd Salleh & Anor [1998] MLJU 474; [1998] 4 CLJ 833, HC (refd)

Izhar bin Ishak v Cheah Per Nam & Anor [2009] 1 PIR (26) (consd)

Kerry v Carter [1969] 1 WLR 1372, CA (refd)

Lee Ewe Teik v Ariffin Hussain [1990] 2 CLJ 191, HC (refd)

Mary Colete John v Angel Helen Puspan a/p Pereira & Anor [2004] 6 Mallal's Digest para (1638) (refd)

Mohd Amiruddin bin Kamaruddin & Anor v Fadzillah bt Abdul & Anor [2008] 1 PIR (35) 213 (consd)

Nasib Kaur & Anor v Cheah Kit & Anor [1968] 1 MLJ 58 (refd)

Thong Hon Fah v Vickneswaran a/l Thanapalan [2001] MLJU 754; [2004] 3 CLJ 415, HC (refd)

Watt v Thomas [1947] AC 484, HL (refd)

Ramamoorthy Doraisamy (Selvanayagam with him) (Ng Chee Kong & Co) for the appellant.

Renuka a/p Paspanathan (B Mohan Raveen & Partners) for the respondents.

Ahmad Nasfy JC:

THE APPEAL

[1] This is an appeal by the appellants/defendants against the decision of the learned session judge ('learned SCJ') given in Ipoh Sessions Court on 29 August 2012. In this judgment parties will be referred to as they appear in the

court below.

BRIEF FACTS

[2] The facts of this case, as in other running down cases, are fairly straight forward. On 12 May 2009 at about 6.30pm the first plaintiff was riding a motorbike bearing a registration No AFU 3274 ('the motorbike') with the second plaintiff riding pillion. According to the evidence at trial they were heading to a store. When they were on the road and at the vicinity of Taman Melati, a motorcar, bearing registration No ABT 118, ('the motorcar') that was driven by the first defendant had collided into the said motorbike.

[3] According to the plaintiffs as a result of the accident, they suffered severe injuries. Again, as it is normal in running down cases, the plaintiffs put the total blame for cause of the accident on the defendant.

[4] The defendants' defence was in the complete opposite of the plaintiffs contention. They denied liability totally. They contended that the said motorbike had made a sudden exit from a junction of the said road ('the junction') and caused a collision with the said motorcar. Hence, the defendants had also filed a counterclaim against the first plaintiff seeking an indemnity for the first plaintiff against damages that they will have to have to bear against the second plaintiff, if any.

DECISION OF THE LEARNED SCJ

[5] The learned SCJ, after full trial and after hearing submissions, held that the defendants are 100% liable. The learned SCJ recorded the following reasons:

(a) the investigating officer (SP1) who visited the scene of the accident has prepared a sketch plan and key (P2-P2K) and took 23 photos (P3a-I). SP1 had concluded from his investigation that the first plaintiff was coming from a left junction in Taman Melati and heading to the top of P2. Whereas the first defendant was travelling from the bottom to the top of P2. SP1 noted that the weather was good and traffic was not busy at that material time, and the road is a straight road with no view obstruction from the bottom to the top.

(b) SP1 further testified that the road were divided into three lanes ie lane B-C is for motorbike, C-D and D-E are the main lanes. Another lane E is meant for U-turn. The accident occurred at lane E. The motorcar had left a brake mark (mark G in P2) along lane D-E which measured about 15 meter long (refer P3a, c and d). There also broken glass splinters from the said motorcar (mark J of P2). All these indicated that the motorcar

was probably driven in an excessive speed. Mark H is scratch mark from the said motorbike, indicating that the motorbike had already passed the said junction and already in lane E.

(c) the first plaintiff testified that he was coming from a left junction and had already passed the lane E. When the collision took place at marked X of P2. It was after he exited the junction the accident occurred.

(d) the first defendant (SD1) had testified that the first plaintiff's motorbike had made a sudden exit from the said junction and obstructed his correct path. He applied his motorcar's brake and swerved to the right but as the motorbike was too close, the accident was inevitable. He claimed that the collision occurred at mark G of P2.

(e) based on the evidence, it is an inherent possibility that the accident occurred at lane E, which the scratch mark H indicated the possibility that the motorbike was probably knock down just before it passed lane E. Hence, the defendant's version that the collision occurred at lane D-E is not acceptable, (see *Lee Ewe Teik v Ariffin bin Hussain* [1990] 2 CLJ 191).

(f) from the sketch plan, the long line brake mark indicated a probable excessive speed from the defendant's motorcar. If he took a proper look out and reduced his speed, this accident could probably he avoided (see *Chai Phin Chong & Anor v Zainal Abidin Mohd Salleh & Anor* [1998] MLJU 474; [1998] 4 CLJ 833, *Thong Hon Fah v Vickneswaran Thanapalan* [2004] 3 CLJ 415 and *Nasib Kaur & Anor v Cheah Kit & Anor* [1968] 1 MLJ 58).

(g) taken into consideration the above circumstances, the learned SCJ held that the first defendant was 100% liable.

QUANTUM

[6] The appeal against quantum only centers on two items as follows:

(a) *General damages:*
Paraplegia — lower limb was awarded RM300,000

(b) *Special damages:*
Nursing care:
Pretrial — RM350 x (3 years and 6 month) — RM 14,700 Post trial part 1 RM700 per month x 240 month = RM168,000
Post trial part 2 — RM900 per month x 372 = RM334,800

A FINDING OF THIS COURT

[7] As regard to liability, in my considered view the crux of the issue in this case is whether the plaintiff had made a sudden exit from the junction of Taman Melati and caused the accident.

B

[8] I must state that from the facts as reflected in the of appeal the following evidence by the plaintiff was not challenged:

(a) *'Selepas saya keluar dari simpang lebih kurang 30 saat kemalangan berlaku'* — at p 51 of the record).

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(b) When replying to the question in examination-in-chief in which part of the plaintiff's motorcycle the defendant's car collided with he said 'dari arah belakang' at p 161 of the record).

D I am of the view that in the circumstances it is reasonable to infer that the motorbike had shortly passed the junction and was at lane D-E and not as what the defendants had claimed. At the same time the motorcar driven by the first defendant who was travelling from the bottom to the top of P2 at lane D-E was probably driven in an excessive speed has collided into the motorcycle. This

E inference is consistent with and supported by the brake mark, G, which measures 15 meter in length.

[9] Based on the evidence of investigating officer and sketch plan, the said road is a straight road and no obstacle to obstruct a driver's front view. That

F being the case, under normal circumstances and if the first defendant had exercised caution he would and should have noticed the presence of the motorcycle at lane D-E and could have avoided the collision. However given that the accident occurred 'lebih kurang 30 saat' after the first plaintiff had come out from the junction a short period of time, I am of the view that the first

G plaintiff also contributed to the accident.

[10] At this juncture it is appropriate for me to state that an appellate court will be slow in disturbing the findings made by a trial court. There are plethoras of authorities on this point. Suffice for me to refer to the case of *Watt v Thomas*

H [1947] AC 484, a case that sets out the role of the appellate court. Lord Thankerton in that case stated as follows:

> I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no

I question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without

having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.

[11] In my considered view in running down cases the advantages enjoyed by the trial court of having seen and heard the witnesses is not the one and only factor that determines the outcome of the decision. Put it differently, running down cases do not fall within a class of cases whereby, to quote Lord Thankerton, 'a class in which it is generally most important to see and hear the witnesses'. In fact in most personal injury cases the evidence of the witness must be tested with the other important evidence such as the sketch plan and keys, the marks on the roads as well as the damage to the vehicles involved in the accident. Thus in personal injury cases the court sitting in an appellate capacity, is not deprived of any advantages that the trial court had had. Support for this view could be found in the case of *Kerry v Carter* [1969] 1 WLR 1372 where Lord Denning had occasion to say:

> We have been referred to cases on this subject, particularly the recent case of *Brown v Thompson* [1968] 1 WLR 1003. Since that case it seems to have been assumed in some quarters that this court will rarely, if ever, alter an apportionment made by the judge. Such is a misreading of that case. I think that the attitude of this court was correctly stated in that case, at p. 1012, by Edmund Davies L.J. when he quoted from the judgment of Sellers L.J. in *Quintas v National Smelting Board* [1961] 1 WLR 401 409. This court adopts in regard to apportionment the same attitude as it does to damages. We will interfere if the Judge has gone wrong in principle or is shown to have misapprehended the facts: but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong. After all, the function of this court is to be a Court of Appeal. We are here to put right that which has gone wrong. If we think that the judge below was wrong, then we ought to say so, and alter the apportionment accordingly.

[12] Having addressed myself of the principles that I had stated above, I am of the considered view that this is an appropriate case where I ought to reverse the decision of the learned SCJ and substituted it with a finding of liability of 70:30 respectively in favour of the plaintiffs as the findings made by the learned SCJ are not consistent with the evidence. I so order.

QUANTUM

[13] As regards to quantum, it is not in dispute that the second plaintiff has suffered the following injuries:

(a) Paraplegia (unable to move the lower limbs) with incontinence of urine and faeces.

(b) Loss of sensation below the umnilicus.

[14] There are two specialist reports as follows:

(a) The plaintiffs' specialist — Dr John Anantham;

(b) The defendants' specialist — Dr Siva.

[15] The evidence of these specialists can best be summarised as follows. The spinal-cord injury which resulted in paralysis of both lower limbs has not recovered. There is no evidence to suggest that recovery is feasible. This finding made 121 months after the injury to the spine is important. Given this finding, the paralysis, has to be taken as a permanent injury. Clinically there is upper motor-neuron injury type of paraplegia, she has an autonomous bladder and bowel control. There is however no voluntary control of the lower limbs. There will be involuntary muscle spasms and tremors when the limbs are irritated or stimulated. There is truncal weakness as shown by her tilt to the right when she sits. The second plaintiff life will be a wheel chair dependent life. Prolonged sitting may cause discomfort due to the truncal weakness. As she grows older she will have to be trained to be able to transfer herself in and out of the wheel chair. There will be some problems here due to the tendency of the lower limbs to go into involuntary spasms.

[16] The learned SCJ awarded RM300,000 global despite the fact he referred to cases which has awarded for less in accordance with the trends of awards such as *Mary Colete John v Angel Helen Puspan a/p Pereira & Anor* [2004] 6 Mallal's Digest para (1638) where RM180,000 was awarded; *Mohd Amiruddin bin Kamaruddin & Anor v Fadzillah bt Abdul & Anor* [2008] 1 PIR (35) 213 where RM160,000 was awarded; and *Izhar bin Ishak v Cheah Per Nam & Anor* [2009] 1 PIR (26) where RM240,000 was awarded.

[17] Having considered the two specialist report and decided cases above, I am of the view that the sum of RM200,000 global awards for these injuries is fair and reasonable.

[18] In respect of special damages ie for nursing care, the learned SCJ awarded as follows:

(a) pre-trial damages of RM14,700;
(calculated on the basis of RM350 x 42 months);

(b) post-trial:

- Part 1 — RM700 x 240 month = RM 168,000;
- Part 2 — RM900 x 372 month = RM334,800.

[19] On appeal, I agreed with the appellant's counsel submission and subsequently reduced the amount of post-trial award for Part 2 being the sum of RM279,000 (calculated on the basis of RM750 per month x 372 months).

[20] In this case it is to be recalled that the evidence of the specialist doctors showed that the second plaintiff's upper limbs are normal and evidence shows she can be independent for part of her daily activities as stated at p 132 of record of appeal (exh P15) which in turn contained the following facts:

- She is able to eat independently;
- When she is older, she would probably be able to shower herself while being seated on a shower commode;
- She would be able to groom herself;
- When she is older, she may be able to dress and undress independently albeit with some difficulty;
- When she is older, she may be able to self administer enemas;
- With proper training in adult life she may be able to independently transfer herself from bed to chair and vice-versa;
- When she is older and with proper training, she will probably be able to use a wheelchair independently.

[21] Quite clearly the evidence shows that the second plaintiff's need for nursing care throughout her life although, as stated above, with proper training, she may be able to do certain things independently. In this regard I am in agreement with the learned SCJ's finding that based on exh P15, it appeared that the second plaintiff's health and condition is actually not bad as it seems. She may lead a quite independent life, provided she is given a proper training.

[22] In relation to that as well it is pertinent to state that the average life expectancy of females in Malaysia is 76.4 years. Taking into consideration of 1/3 deduction for contingency, I am of the view that the life span of the second plaintiff is 612 months. The second plaintiff, as alluded earlier, will be a wheelchair-bound person throughout her life. This would necessitate a helper to assist her to carry out activities of her daily living. That being the case and having considered the current negotiated rate of foreign maid it is reasonable to say that the monthly wages for a helper will be around RM750 to RM900 per month.

[23] The learned SCJ had divided 612 months into two parts which I agreed. However the figure awarded for the remaining 372 months in Part 2 to my mind is on the high side. In my view the more appropriate figure is RM750 X

372 months which equals to RM279,000. I so order.

CONCLUSION

[24] Based on the reasons adumbrated above I allowed the appeal against liability and quantum, in part as clarified above, with costs.

Appeal against liability and quantum allowed in part with costs.

Reported by Kohila Nesan